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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-714

MARTY'S FLOOR COVERING COMPANY, INC., *Petitioner,*

v.

GAF CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent GAF Corporation respectfully requests that this Court deny the writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion below of the United States Court of Appeals for the Fourth Circuit is reported at 604 F.2d 266.

QUESTIONS PRESENTED

The questions presented by the petition of Marty's Floor Covering Co., Inc. are as follows:

1. Whether the Court of Appeals properly affirmed the District Court's factual finding that the distributor Norman Deitch of Maryland, Inc. functioned as a factor or discounter in sales transactions between the manufacturer GAF Corporation and the purchaser Marty's Floor Covering Co., Inc., so that no resale price maintenance occurred.

2. Whether the Court of Appeals properly affirmed the District Court's finding that the facts did not provide any reasonable grounds for questioning the impartiality of the presiding trial judge under 28 U.S.C. § 455, and therefore there were no adequate or substantial grounds for a new trial.

COUNTERSTATEMENT OF THE CASE

Petitioner, Marty's Floor Covering Co., Inc. (hereafter referred to as "Marty's Floor Covering"), is a commercial contract floor tile installation company in Northern Virginia which for several years has purchased tile manufactured by respondent, GAF Corporation.

Prior to 1975, all dealings involving GAF brand commercial floor tile between Marty's Floor Covering and GAF Corporation were direct: orders were placed directly with GAF Corporation; tile was shipped by GAF Corporation directly to Marty's Floor Covering's warehouse or job site; GAF Corporation billed Marty's Floor Covering; and Marty's Floor Covering made its payments to GAF Corporation. In 1975, collection pro-

cedures were modified somewhat. Orders in most instances, and shipments in all instances, continued to be directly between GAF Corporation and Marty's Floor Covering. Billing and payment procedures, however, were changed: GAF Corporation billed its area distributor, Norman Deitch of Maryland, Inc. ("Norman Deitch"), at a wholesale price for shipments to Marty's Floor Covering, and all payments to GAF Corporation were made by Norman Deitch; Norman Deitch in turn billed Marty's Floor Covering at a marked up price, and Marty's Floor Covering made its payments to Norman Deitch. Pet. 1a, 20a; 604 F.2d at 269, Pet. 5c-6c.

Marty's Floor Covering filed suit against GAF Corporation in the United States District Court for the Eastern District of Virginia alleging, *inter alia,* that GAF Corporation had engaged in resale price maintenance in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet. 19a. Following a non-jury trial on the merits, the Honorable Richard B. Kellam, Chief Judge, dismissed the complaint for failure of proof. In concluding that GAF Corporation had not violated the Sherman Act, the District Court held that "the role of [Norman] Deitch in the relationship between Marty's [Floor Covering] and GAF [Corporation] seems to be merely that of a factor or discounter. . . . It is as though [Norman] Deitch bought the contract between GAF [Corporation] and Marty's [Floor Covering] for a discount." Pet. 20a.

Nine days after the District Court dismissed the complaint, Marty's Floor Covering filed a motion for a new trial, relying solely on the judicial disqualification statute, 28 U.S.C. § 144, and the recusal statute, 28 U.S.C. § 455. R. 397-402. The grounds set out in an

affidavit of disqualification accompanying the motion were 1) that Judge Kellam in 1930 had been an incorporator, vice president and director of a Virginia corporation named Kellam and Eaton, Incorporated, 2) that Judge Kellam's brother is president of Kellam and Eaton, Incorporated, and 3) that Kellam and Eaton, Incorporated is listed in the telephone directory "yellow pages" as a dealer for GAF brand tile. R. 404-405.

Upon the filing of the motion, Judge Kellam voluntarily recused himself and took no further action in the case, referring the matter to another judge, the Honorable John A. MacKenzie, for consideration. Pet. 2b; 604 F.2d at 268, Pet. 2c. Following a hearing on the motion for a new trial at which Judge Kellam testified, Judge MacKenzie held "that Judge Richard B. Kellam has had no ownership interest, stock or otherwise, in Kellam and Eaton, Incorporated; that he served as a director in his brother's business from 1930 to 1940; that he has no knowledge of any building materials sold by Kellam and Eaton, Incorporated manufactured by GAF Corporation . . . . that [he] has no interest in this litigation; has no connection with any party or counsel with this litigation, and that it was, and is, in no wise improper for him to have heard and determined the matters in issue. . . . [T]he motion for a new trial is absolutely devoid of any reason whatsoever." Pet. 4b.

The United States Court of Appeals for the Fourth Circuit affirmed in all respects Judge Kellam's dismissal of the complaint and Judge MacKenzie's denial of the motion for a new trial. Addressing first the question of disqualification or recusal of Judge Kellam, the Court of Appeals held that any issue of disqualification

under 28 U.S.C. § 144 had been mooted by Judge Kellam's voluntary recusal. 604 F.2d at 268, Pet. 3c. The Court of Appeals also noted that Section 144 affords only prospective relief; it cannot be used to obtain a new trial. *Id.* Applying the recusal statute to the contentions raised in the motion for a new trial, the Court of Appeals held that none of the specific grounds for disqualification listed in 28 U.S.C. § 455(b) had any pertinence to the case. The sole recusal question, therefore, was whether the general standard of 28 U.S.C. § 455(a) applied: "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questoned." The Court of Appeals, like the District Court, was "unable to conclude that the facts demonstrated here provide the slightest ground for reasonably questioning Judge Kellam's impartiality." 604 F.2d at 269, Pet. 4c. On the question of a new trial, the Court of Appeals observed that separate and apart from either the disqualification or the recusal statute, "if the facts disclosed . . . showed such a lack of fundamental fairness as to vitiate the trial under the due process clause, a new trial could be had on constitutional grounds . . . but no such contention has been advanced in the case at bar", and "no adequate or substantial grounds for granting a new trial have been shown." 604 F.2d at 268, 269, Pet. 3c-4c.

Addressing the substantive antitrust claim made by Marty's Floor Covering with respect to resale price maintenance, the Court of Appeals, "looking to the substance of the parties' dealings rather than merely to form," agreed with the District Court's holding that the distributor's function with respect to the transactions between GAF Corporation and Marty's Floor Covering was "merely that of a factor or discounter."

604 F.2d at 269, Pet. 5c; *see* Pet. 20a. In reaching this conclusion the Court of Appeals acknowledged that "there was perhaps a technical transfer of title to the tile sold from [GAF Corporation] to [Norman] Deitch and then from [Norman] Deitch" to Marty's Floor Covering, but found that GAF Corporation "was in fact continuing to sell its tile to [Marty's Floor Covering] and might properly quote the prices at which it wished to sell to [Marty's Floor Covering]." *Id.* "Consequently we conclude that the charge of retail price maintenance is not substantiated." 604 F.2d at 270, Pet. 6c. On August 17, 1979, the Court of Appeals denied a petition for rehearing by Marty's Floor Covering. Pet. 1d.

REASONS FOR DENYING THE WRIT

The issues raised in the petition relate solely to the propriety of factual findings made in the first instance by the District Court as trier of fact and affirmed in all particulars by the Court of Appeals. The petition advances no argument that either court below misconceived or misapplied the law to those facts. Thus, there is no legal issue before this Court warranting review on certiorari.

1. The Factual Finding That No Resale Price Maintenance Occurred Did Not Create Any New Sherman Act Standard Or Exception.

The holding of the courts below that GAF Corporation did not engage in resale price maintenance in the transactions in which Marty's Floor Covering purchased GAF brand commercial floor tile was based on the courts' factual evaluation of the relationship between the parties rather than any special conception of the Sherman Act. The trial court simply found, and

the Court of Appeals agreed, that as to the sales to Marty's Floor Covering there was in commercial reality no resale by Norman Deitch. Rather, Norman Deitch's sole participation in those transactions involved billing and collection.[1] This finding in no way created an exception to the Sherman Act bar to resale price maintenance schemes.

The factual evaluation made by the courts in this case is no different from, and just as proper as, the basis for the finding by the Fifth Circuit of a valid consignment sale in *Hardwick* v. *Nu-Way Oil Co.*, 589 F.2d 806 (5th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3218 (Oct. 1, 1979), a case relied on by Marty's Floor Covering (Pet. 6-7). In *Hardwick*, the gasoline station operator merely had a money collection function, and not the entrepreneurial ownership indicia of the gasoline station owner in *Simpson* v. *Union Oil Company*.[2] 589 F.2d at 810-811. Consequently, the Fifth Circuit found, as did the Fourth Circuit here as to Norman Deitch, that no resale price maintenance occurred. *Id.* at 811.

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[1] Marty's Floor Covering complains that the courts below ignored pretrial stipulations. Pet. 7-8. To the contrary, however, the District Court merely determined, in accordance with pretrial stipulation 16, what types of sales occurred. Stipulation 16 provides:

> 16. [GAF Corporation] ships floor tile products sold to dealers and other customers directly to the customers at times, and at other times sells and ships to its distributor to be resold and reshipped.

R. 71. The District Court found, and the Court of Appeals agreed, that GAF Corporation's transactions with Marty's Floor Covering came within the first part of stipulation 16, involving "tile products sold to dealers and other customers directly", rather than the second part, involving tile products which were sold and shipped to the distributor "to be resold and reshipped."

[2] 377 U.S. 13, 20 (1964).

Absent a factual finding of resale price maintenance, the per se rules applicable to price fixing arrangements under Section 1 of the Sherman Act are entirely irrelevant.[3] Thus, the holding of the Fourth Circuit does not contribute to, much less create, any new exception to the Sherman Act.

2. Petitioner Showed No Reasonable Grounds For Questioning The Impartiality Of The Trial Judge.

The finding of Judge MacKenzie, concurred in by the Court of Appeals, that Judge Kellam's affiliation with his brother's business 40 to 50 years ago provided neither a reasonable basis for Judge Kellam's recusal[4] nor any adequate or substantial grounds for a new trial neither misperceives nor misapplies the judicial recusal statute, 28 U.S.C. § 455.

The petition misconstrues the holding of the Court of Appeals as well as the standards and requirements of 28 U.S.C. § 455. Contrary to the petition's assertion that the Court of Appeals held "that §§ 144 and 455

[3] Marty's Floor Covering's complaint about the price structure (whether fixed or not) is unusual, since the price at which GAF Corporation sold Marty's Floor Covering the floor tile was below the price at which Norman Deitch could have resold it. The District Court properly concluded, "[n]or is there any apparent anticompetitive effect . . . . The prices charged to Marty's [Floor Covering] did not rise . . . ." Pet. 20a. Consequently, there has been no antitrust injury in fact. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[4] With respect to the affidavit of disqualification filed by Marty's Floor Covering pursuant to 28 U.S.C. § 144, the Court of Appeals properly held that the issue of its effect was moot, "since Judge Kellam's voluntary action [recusing himself] afforded [Marty's Floor Covering] all the relief which would have been obtainable under 28 U.S.C. 144: 'such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.'" 604 F.2d at 268, Pet. 3c.

did not provide prospective relief, and therefore, a new trial was not available as a remedy" (Pet. 10),[5] the Fourth Circuit stated that only prospective relief was available under 28 U.S.C. § 144,[6] but as to 28 U.S.C. § 455 held that no reasonable basis for questioning the trial judge's impartiality had been shown. 604 F.2d at 268, 269, Pet. 3c, 4c.[7] The argument advanced by Marty's Floor Covering suffers from this fatally defective premise.

The Court of Appeals clearly dealt with the issue of the trial judge's impartiality under Section 455, and upheld the District Court's finding that the claim of bias was unfounded: "Without accepting Judge MacKenzie's characterization of the contention as something 'that comes as close to being ridiculous . . . as anything I ever heard,' it suffices to say that no adequate or substantial grounds for granting a new trial have been shown." 604 F.2d at 269, Pet. 4c; *see* R. 478. Judge

[5] In fact, the Court of Appeals noted that if there were "such a lack of fundamental fairness as to vitiate the trial under the due process clause, a new trial could be had on constitutional grounds independently of 28 U.S.C. 144, but no such contention has been advanced in the case at bar." 604 F.2d at 268, Pet. 3c-4c.

[6] *See* Smith v. Insurance Co. of North America, 213 F. Supp. 675, 700 (M.D. Tenn. 1962) (Supplemental Opinion 1963) (a Section 144 affidavit, "if effective at all, could not have retroactive effect on decisions already made"). *See also* United States v. Ramos, 291 F. Supp. 71, 75 (D.R.I. 1968), *aff'd*, 413 F.2d 743 (1st Cir. 1969); United States v. Hoffa, 247 F. Supp. 692, 699 (E.D. Tenn. 1965).

[7] Judge MacKenzie's denial of the motion for a new trial was in no way an abuse of "sound judicial discretion", H.R. REP. No. 93-1453, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS 6351, 6355, the congressionally mandated standard for judicial consideration of motions made pursuant to 28 U.S.C. § 455.

Kellam's relationship with his brother's business 40 to 50 years ago, and the fact that (unknown to Judge Kellam)[8] his brother's business in the four years preceding trial had purchased only $1,212.00 of GAF brand tile, in no way raised any reasonable doubt as to Judge Kellam's impartiality. 604 F.2d at 269, Pet. 4c. The courts below thus properly made the finding, in accordance with Section 455, that the allegations against Judge Kellam were legally insufficient to constitute bias requiring recusal.[9]

Thus, there was no legal question for the Fourth Circuit, nor is there any before this Court, as to whether a finding of judicial bias warrants the grant of a new trial, because no such bias was found. Absent such a finding, Marty's Floor Covering advances no other basis for a new trial. 604 F.2d at 268, Pet. 3c-4c; *see* note 5, *supra*.

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[8] A judge is only required to inform himself of his own business affairs and those of "his spouse and minor children *residing in his household*." 28 U.S.C. § 455(c) (emphasis added). A judge is not required to be aware of every business relationship of every relative he might have; as to such relatives, the proscription of 28 U.S.C. § 455 is limited to that of which the judge has knowledge: "He shall also disqualify himself in the following circumstances: . . . a person within the third degree of relationship . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(5)(iii).

[9] The uniformly applied legal measure under 28 U.S.C. § 455 is an "objective standard". H.R. REP. No. 93-1453, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. CODE CONG. & ADMIN. NEWS 6351, 6354. The recitations relied on in the motion clearly did not evidence a judicial partiality "grounded on facts which would create a reasonable doubt . . . not in the mind of the judge or even in the mind of the litigant . . . but rather in the mind of the reasonable man." United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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